Supreme Court, U.S.
FILED
OCT 17 2002
OFFICE OF THE CLERK

No. 02 585

In The

Supreme Court of the United States

PEABODY COAL CO.,

Petitioner,

v.

ROBERT D. GRAY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
800 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20006
(202) 533-2361

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

66 pp

QUESTIONS PRESENTED[1]

The decision below applies a *per se* rule requiring an administrative law judge to accord a treating doctor enhanced credibility in adjudicating claims for benefits under the Black Benefits Act. 30 U.S.C. §§ 901-945 ("Act" or "BLBA"). The questions presented are:*

a) Does the Sixth Circuit's treating physician rule violate sections 7(c) and 12 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 556(d), 559, section 21(b) and (c) of the Longshore Act ("LHWCA"), 33 U.S.C. §§ 921(b), (c), and this Court's law prohibiting *per se* rules exaggerating the weight that must be accorded certain evidence without a valid reason?

b) Is the Department of Labor's treating physician rule in 20 C.F.R. § 718.104(d) invalid as applied because it is arbitrary and capricious and not in accordance with law?

---

* The questions presented here are identical to those presented in *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (U.S. Aug. 15, 2002) (No. 02-249). If the petition for a writ of certiorari is granted in *Groves*, it is respectfully requested that this case be consolidated with it for plenary review or, in the alternative, that this case be held in abeyance pending the disposition of *Groves*.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner, Peabody Coal Company, is a wholly owned subsidiary of Peabody Energy Corporation. Respondent Robert D. Gray is a claimant for benefits under the BLBA. The Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the black lung benefits program and is a statutory party in black lung claims. 30 U.S.C. § 932(k).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. Background	4
C. Gray's Claim	6
D. The Rulemaking	9
REASONS FOR GRANTING THE WRIT	10
A. The Courts of Appeals' Opinions Cannot be Reconciled	10
B. The Treating Doctor Rule is Not Authorized	15
C. The Court of Appeals Decision Dramatically Upsets the Expectations of Employers and Insurers and May Make the Black Lung Program Unaffordable and Unmanageable	16
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES:

Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998) 8

Amax Coal Co. v. Beasley, 957 F.2d 324 (7th Cir. 1992) 11

Canavan's Case, 733 N.E.2d 1042 (Mass. 2000) 14

Consolidation Coal Co. v. OWCP, 54 F.3d 434 (7th Cir. 1995) 11

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 10

Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994) 2, 4, 5, 8

General Elec. Co. v. Joiner, 522 U.S. 136 (1997) 10

Jericol Mining, Inc. v. Napier, 301 F.3d 703 (6th Cir. 2002) 13, 14

Lango v. Director, OWCP, 104 F.3d 573 (3d Cir. 1997) 12

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) 4

Peabody Coal Co. v. Groves, 277 F.3d 829 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (U.S. Aug. 15, 2002) (No. 02-249) ..... *passim*

Peabody Coal Co. v. Helms, 901 F.2d 571 (7th Cir. 1990) 11

Peabody Coal Co. v. McCandless, 255 F.3d 465 (7th Cir. 2001) 10, 11

Ragsdale v. Wolverine World Wide, Inc., 122 S. Ct. 1155 (2002) 8

TABLE OF AUTHORITIES – Continued

Page

Sterling Smokeless Coal Co. v. Akers, 131 F.3d 438 (4th Cir. 1997) 12

Tussey v. Island Creek Coal Co., 982 F.2d 1036 (6th Cir. 1993) 7, 8

U.S. Steel Mining Co., Inc. v. Director, OWCP, 187 F.3d 384 (4th Cir. 1999) 11

Weisgram v. Marley Co., 528 U.S. 440 (2000) 10

Wolf Creek Collieries v. Director, OWCP, 298 F.3d 511 (6th Cir. 2002) 13, 14

STATUTES AND REGULATIONS:

Administrative Procedure Act, as amended,

5 U.S.C. §§ 551-559; 701-706 2

Section 4(b), 5 U.S.C. § 553 6

Section 7(c), 5 U.S.C. § 556(d) 2, 15

Section 12, 5 U.S.C. § 559 15

Section 10(e), 5 U.S.C. § 706 ..... 2, 6

28 U.S.C. § 1254(1) 2

Black Lung Benefits Act, as amended,

30 U.S.C. §§ 901-945 2

Section 413(b), 30 U.S.C. § 923(b) 5

Section 416(a), 30 U.S.C. § 926(a) 6

Section 422(a), 30 U.S.C. § 932(a) 4, 5

Section 422(k), 30 U.S.C. § 932(k) ii

Section 424, 30 U.S.C. § 934 5

Section 435, 30 U.S.C. § 945 5

TABLE OF AUTHORITIES – Continued

Page

Longshore Act, as amended,
33 U.S.C. §§ 901-950 2
Sections 19-22, 33 U.S.C. §§ 919-922 4
Section 19(d), 33 U.S.C. § 919(d) 2
Section 21(b), 33 U.S.C. § 921(b) 5
Section 21(c), 33 U.S.C. § 921(c) 2, 5
Section 23(a), 33 U.S.C. § 923(a) 5
Department of Labor Regulations
20 C.F.R. § 718.104(d) (2000) 2, 3, 9
20 C.F.R. § 725.309 (2000) 6

MISCELLANEOUS:

Cal. Labor Code § 4062.9 (2002) 9
Davis and Pierce, *Administrative Law Treatise* (3d ed. 1994) 14
Department of Labor Rulemaking Record, 20 C.F.R. Part 718, *et al.*
Exhibit 5-165: Comments on Proposed Rule: Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended, by Daniel E. Banks, M.D., FCCP, *et al.*, representing the American College of Chest Physicians Section on Occupational and Environmental Health (Aug. 20, 1997) 15

PETITION FOR WRIT OF CERTIORARI

The Peabody Coal Company respectfully petitions for a writ of certiorari to review the judgment and opinion of The United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unpublished. Appendix ("App.") 1. The order of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing *en banc* is unreported. App. 34.

The administrative decisions also are unreported. These include:

1) The decision of the administrative law judge ("ALJ") dated September 20, 1999, denying benefits. App. 16.

2) The decision of the Benefits Review Board, United States Department of Labor, dated November 6, 2000. App. 10.

3) The order on motion for reconsideration of the Benefits Review Board, dated December 20, 2000 affirming the denial of benefits. App. 8.

JURISDICTION

The judgment of the Sixth Circuit was issued on April 19, 2002. A timely petition for rehearing was denied on

July 26, 2002. App. 34. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d). App. 37;

2. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706. App. 37;

3. Section 19(d) of the Longshore and Harborworkers' Compensation Act, 33 U.S.C. § 919(d). App. 38;

4. Section 21(c) of the Longshore and Harborworkers' Compensation Act, 33 U.S.C. § 921(c). App. 39; and

5. 20 C.F.R. § 718.104(d). App. 40.

STATEMENT OF THE CASE

A. Introduction

The Sixth Circuit applies a treating doctor rule in federal black lung benefits claims.[1] This rule requires the adjudicator to accord more weight to the opinion of a

[1] Black lung claims are filed and adjudicated in accordance with Part C of Title IV of the Federal Coal Mine Health and Safety Act, as amended. 30 U.S.C. §§ 901-945. The provisions for the adjudication of these claims are incorporated by reference from the LHWCA, 33 U.S.C. §§ 901-950. The LHWCA further incorporates the on-the-record hearing provisions of the APA, 5 U.S.C. §§ 554-559. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

treating doctor. This rule has no scientific, medical or legal foundation and the court below has never articulated a rationale for the rule. It has the potential to control the outcome in thousands of black lung claims, without regard to the best reasoned, most expert and most reliable medical evidence. The rule trumps all the ordinary standards for the evaluation of conflicting medical evidence and makes substantial evidence review on appeal essentially impossible. According to the court below, reliance on the treating doctor constitutes substantial evidence in support of an award of benefits and little else matters.

The Sixth Circuit's disposition of this case reveals the other side of the treating doctor formula. Here, the finder of fact rejected the treating doctor's opinion in favor of more expert views of pulmonary disease specialists that were better documented by the medical data and better explained. The Sixth Circuit reversed the denial, sending the case back to the ALJ with the mandate that more weight "must" be given to the treating doctor's opinion. There is no fair adjudication when this unfounded rule is employed and this case further reveals the Sixth Circuit's commitment to an inappropriate legal standard that undermines the rule of law in black lung adjudications.

In *Groves*, this Court is asked to review the validity of the Sixth Circuit's rule. There, the court of appeals reaffirmed its commitment to a treating doctor rule and announced that it would apply the rule in keeping with a new regulation published by the Department of Labor ("DOL"). The new regulation articulates DOL's version of a treating doctor rule adopted by the agency for evidence developed after January 19, 2001. 20 C.F.R. § 718.104(d). The DOL rule, like the Sixth Circuit's rule, is supported by nothing and is criticized by all relevant commentary

received into the rulemaking record by the agency. *See* Petition for a Writ of Certiorari, *Groves*, 277 F.3d 829 ("Groves Petition") at 19-22.[2]

Some version of the treating doctor rule is being applied now in the adjudication of claims arising within the Sixth Circuit's jurisdiction, but elsewhere as well. There is no real defense to the rule when it is applied and it puts more operators and their insurers in the position of having to accept undeniably unfair adjudication that makes the best evidence largely irrelevant where it conflicts with the treating doctor's opinion.

This Court's intervention is sought to preclude this injustice and to avert what is likely to be a litigation and insurance crisis for the black lung program.

B. Background

The BLBA is a federal workers' compensation law that provides benefits to coal miners and their families on account of total disability or death due to pneumoconiosis or "black lung" disease. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991). The procedures for the adjudication of black lung claims are set forth in the LHWCA. *Greenwich Collieries*, 512 U.S. at 271; 33 U.S.C. §§ 919-922, *incorporated by reference into* 30 U.S.C. § 932(a). By virtue of this incorporation, the APA also applies in the adjudication of black lung claims. In *Greenwich Collieries*, this Court

[2] A copy of the *Groves* Petition has been served on the parties with this Petition.

rejected the DOL's claim that the APA does not apply to black lung adjudications. *Id.*

In claims filed on or after July 1, 1973, and certain other claims subject to review by DOL under 30 U.S.C. § 945, benefits are paid by a mine operator, its insurance carrier, or if no responsible operator can be found, an entity called the Black Lung Disability Trust Fund. 30 U.S.C. §§ 932(a), 934.

Disputed claims are tried by an administrative law judge ("ALJ"). Appeals from an ALJ's decision may be taken to DOL's Benefits Review Board ("Board"). The Board conducts an appellate review only to determine whether the ALJ's decision is supported by substantial evidence and in accordance with law. 33 U.S.C. § 921(b). Appeals from the Board's decision may be taken as of right to the U.S. court of appeals with jurisdiction over the place where the miner worked for the employer. The court of appeals also conducts substantial evidence review. *Id.* § 921(c).

The LHWCA prescribes no rules of evidence or treating doctor factor. It provides only that "common law or statutory rules of evidence or . . . technical or formal rules of procedure" do not apply except as set forth in the LHWCA and that the adjudicator "may make such investigation or inquiry or conduct such hearing in such a manner to best ascertain the rights of the parties." 33 U.S.C. § 923(a).

The BLBA incorporates these provisions. 30 U.S.C. § 932(a). The BLBA also requires the factfinder to consider all relevant medical evidence including a treating doctor's records as well as a list of other medical information. 30 U.S.C. § 923(b).

Rulemaking for the black lung program must be conducted in conformity with 5 U.S.C. § 553. 30 U.S.C. § 926(a). Rules adopted for the program are subject to review in accordance with the criteria set forth in 5 U.S.C. § 706.

C. Gray's Claim

Robert Gray's black lung claim has been denied many times. He first filed for benefits in 1989, after he retired from coal mining. That claim was denied because Gray did not have black lung disease or any related disability. App. 21. He filed a new claim in 1997,[3] long after his retirement. DOL administratively denied the claim and following a *de novo* hearing, an ALJ also denied the claim. The ALJ found that Gray's condition changed because he could not perform heavy manual labor. By then, he was over sixty years old. Notwithstanding this change in Gray's condition, the ALJ credited the most expert physicians to conclude that Gray did not suffer from black lung disease and could not therefore be awarded benefits. App. 32-33. The ALJ considered a contrary opinion by Dr. Valentino Simpao, but found no reason to credit it over the more expert medical witnesses. *Id.*[4] Dr. Simpao briefly treated Gray and gave him several annual physical examinations. There is no record of treatment for black lung disease.

---

[3] DOL allows repeated filings if there is a material change in the miner's condition. 20 C.F.R. § 725.309.

[4] Four pulmonary disease specialists believed that Gray had no black lung disease and that his impairment was due to a long history of heavy cigarette smoking.

Gray, by his attorney, appealed to the Benefits Review Board and on November 6, 2000, the Board affirmed the ALJ's decision. App. 10. The Board held: "Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. . . ." App. 15.

Gray appealed *pro se* to the Sixth Circuit and filed a statement in support of his appeal. Peabody argued that the ALJ's decision was supported by substantial evidence and should be affirmed for that reason. Peabody noted in passing that the new DOL treating doctor rule did not apply and that even if it were applied, the rule provided no rationale for giving more credit to Dr. Simpao's opinion.

In a strongly worded opinion, the court of appeals remanded the case to the ALJ and admonished: "On remand, the ALJ must reweigh the evidence after giving the opinion of Dr. Simpao additional weight based on his status as Gray's treating physician." App. 7.[5] Following its opinion in *Groves* and an earlier decision, *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993), the court below held "that opinions of treating physicians are entitled to greater weight than those of non-treating physicians. . . . [O]ur precedents establish that the medical

[5] The court also faulted the ALJ for crediting physicians who did not consider several x-ray reports by one reader who found more advanced black lung than the other readers. The pulmonary specialists considered several x-rays and it is not apparent how more x-rays would have mattered. The ALJ, however, considered the x-rays in total and found the reports of this one doctor to be less credible. App. 28. It is hard to understand what the court would expect the ALJ to do on remand in this respect.

opinions of treating physicians must be accorded additional weight where the ALJ finds them to be well reasoned and credible on the merits."[6] "It was error, under these circumstances, not to give additional weight to the opinion of Dr. Simpao, based on his status as treating physician." App. 5-6. Here, there is no reference to DOL's new regulation.

Peabody filed a timely petition for rehearing and suggestion for rehearing *en banc*. Peabody asked the court to reconsider its *Groves/Tussey* rule in light of its fairly apparent use as an illegal burden-shifting presumption in Gray's case. As applied in Gray's case, it looks more like an irrebuttable presumption in favor of the treating doctor's opinion so long as the opinion standing alone appears to be reasoned and supported by medical data. This formulation goes far beyond any prior application of a treating doctor rule and belies the court's insistence that its rule is only a modest adaptation of DOL's new regulation. The court's principal holding does not merely exaggerate the weight that must be accorded this type of evidence, it mandates controlling weight as a matter of law without even a hint of a good reason for doing so. Peabody urged the Sixth Circuit to consider the dramatic and unprecedented mandate in light of the APA, *Greenwich Collieries, Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359 (1998), and *Ragsdale v. Wolverine Worldwide, Inc.*, 122

---

[6] More precisely, the ALJ did not find the opinion of Dr. Simpao to be "credible." The ALJ found that the opinion was "well documented and well reasoned" but outweighed by the more expert opinions of pulmonary specialists. App. 29. The opinion standing alone might have carried the day, but not in the face of stronger contradictory evidence.

S.Ct. 1155 (2002) (cautioning against the use of *per se* rules that are not well founded in fact). Peabody argued also that the rule violates the principles of substantial evidence review by precluding review in any normal sense, and urged the court to consider California's unfortunate experience with a similar rule, that ultimately was revised. *See* Cal. Labor Code § 4062.9.

The court of appeals denied rehearing on July 26, 2002. App. 35. This petition for a writ of certiorari followed.

D. The Rulemaking

The court of appeals' opinion here is unpublished and the court paid no lip service to the new DOL regulation.[7] In light of *Groves* and the court's reliance on *Groves* in this case, presumably the *Groves*/DOL formula informed the court's analysis. The history of the DOL rulemaking is set forth more fully in the Groves Petition at 9-12.

---

[7] The regulation would not retroactively apply to this case, but in *Groves*, the court of appeals announced an intent to follow the rule as a "guideline." *Groves*, 277 F.3d at 834 & n.6. The rule directs the ALJ to consider factors including whether the treating doctor treated the miner for respiratory problems, the duration of the relationship, and the extent and frequency of the treatment. 20 C.F.R. § 718.104(d). While these factors might be relevant to the weight accorded a physician's opinion, none of them provide a rationale for crediting the opinion over other, perhaps more expert opinions, that also consider the miner's medical history. DOL developed no record in support of these factors in the course of the rulemaking.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' Decisions Cannot Be Reconciled

The decision of the court of appeals here erects a clear rule requiring the trier of fact in black lung cases to give more weight to the treating doctor if the treating doctor's opinion is documented by some kind of medical data and reaches a reasoned conclusion. The opinion does not need to be the strongest or most expert opinion or the best evidence. It needs only to be facially relevant and probative.[8]

The Fourth and Seventh Circuits have very different approaches. In these circuits, a physician's status as a treating doctor is irrelevant in determining the credibility and weight that will be accorded to a medical opinion. Both courts impose a gatekeeper obligation on the fact-finder to conduct whatever inquiry is necessary to ensure that facts resting upon scientific or medical information are determined on the basis of the strongest medicine or science available. "Agencies relax the rules of evidence because they believe that they have the skill needed to handle evidence that might mislead a jury. . . . They have a corresponding obligation to *use* that skill when evaluating technical evidence." *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-469, citing *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993); *Weisgram v. Marley Co.*, 528 U.S. 440, 445 (2000), and *General Elec.*

---

[8] The unpublished character of the decision is not important in black lung claims. The decision is published on the ALJ's website and it is used as authority. See http://www.OALJ.gov/public/blalung/retrnc/blnw 042002.htm#black20%lung.

Co. v. Joiner, 522 U.S. 136 (1997). *Accord: U.S. Steel Mining Co., Inc. v. Director, OWCP*, 187 F.3d 384, 389 (4th Cir. 1999).

In the absence of medical or scientific support for the proposition that a treating doctor's status enhances that doctor's insight into the medical elements of a black lung claim, there is no legal or medical reason to give the treating doctor's opinion additional weight. In *McCandless*, the ALJ credited a treating physician's opinion over better-credentialed experts assuming that "treating physicians are (by definition) familiar with patients' medical condition during life." 255 F.3d at 470. The Court of Appeals reversed, holding:

> "[I]t is irrational to prefer the opinion of the treating physician, who is often not a specialist, over the opinion of a non-treating specialist *solely* because one physician is the treating physician." . . . Treating physicians often succumb to the temptation to accommodate their patients (and their survivors) at the expense of third parties such as insurers, which implies attaching a discount rather than a preference to their views.
>
> The ALJ must have a medical reason for preferring one physician's conclusion over another's. . . . [The treating doctor's] *beliefs* must be supported by medical reasons if they are to be given legal effect.

McCandless, 255 F.3d at 469-70 (citation omitted). The Seventh Circuit consistently has refused to accord any weight to the status of treating or examining physicians. *See Consolidation Coal Co. v. OWCP*, 54 F.3d 434, 438 (7th Cir. 1995); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327 (7th Cir. 1992); *Peabody Coal Co. v. Helms*, 901 F.2d 571,

573 (7th Cir. 1990). The Seventh Circuit has not affirmed an ALJ's decision according significant weight to a physician's treating doctor status, and has not disturbed a denial of benefits because insufficient consideration was given to the treating doctor.

The Fourth Circuit's holdings are similar. Relying on Seventh Circuit authority, the Fourth Circuit held:

> "[n]either this circuit nor the Benefits Review Board has ever fashioned either a requirement or a presumption that treating or examining physicians' opinions be given greater weight than opinions of other expert physicians."

Sterling Smokeless Coal Co. v. Akers, 131 F.3d 438, 441 (4th Cir. 1997) (citations omitted). The court vacated an award of benefits on this basis, noting "[i]n reaching its conclusion, the ALJ ignored entirely the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Id.* The Fourth Circuit has not granted an appeal by a claimant predicated on the theory that insufficient weight was given to a treating doctor because of the doctor's status nor has the court upheld a decision to credit a physician based upon status. The Third Circuit, noting a difference of opinion between the Sixth and Seventh Circuits over the significance of treating doctors' opinions, held that an ALJ should not credit a conclusory opinion by a treating physician. *Lango v. Director, OWCP,* 104 F.3d 573, 577 (3d Cir. 1997).

The decision in Gray's case, which is written by the author of the decision in *Groves*,[9] requires that substantial weight be given to the treating physician because of status alone. There is no substantial evidence review in *Gray* because the court found legal error in the ALJ's failure to weigh the doctor's status in the course of fact-finding and failure to artificially exaggerate the weight accorded to the doctor's opinion on account of that status.

In the third decision in this series, *Stephens*, the employer appealed from an award in which the ALJ gave conclusive weight to a treating doctor whose principal report was written before a treating relationship began. All of the objective tests relied upon by this "treating" doctor were discredited, the doctor understated the miner's smoking habit by at least 50 pack/years and the doctor made no attempt to document his findings with medical data.

After repeating the proposition that the Sixth Circuit had no presumption or automatic rule, the court observed that the ALJ properly discredited the DOL expert and employer's experts because they did not examine Mr. Stephens. 298 F.3d at 522. On "substantial evidence" review, the court of appeals noted that it would not

---

[9] The general continuity of judges in *Groves*, *Gray*, *Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511 (6th Cir. 2002) ("*Stephens*"), and most recently, *Jericol Mining, Inc. v. Napier*, 301 F.3d 703 (6th Cir. 2002), suggests that the court's varying approaches are consistent and highlights the flexibility of the Sixth Circuit's rule in precluding substantial evidence review. The rule is only as powerful as it needs to be ultimately to enforce complete deference to the treating doctor's opinion.

re-evaluate the ALJ's credibility determinations. *Id.* at 522-23.

Napier is the court of appeals' most recent decision. Here, the court applied the DOL regulation. Finding no reason under the regulation to give more weight to the treating doctor than was accorded other examining doctors, the Court affirmed anyway, noting that it could not re-weigh the evidence or second-guess the ALJ's credibility determination. The court then concluded that the ALJ's decision was supported by substantial evidence and affirmed the decision. The court does not mention the fact that the ALJ resolved the question of physician credibility solely on the basis of the treating doctor status. In *Napier*, the court of appeals again denies that it has created a presumption or automatic preference based on status. 301 F.3d at 709.

The court may reject labels, but there is not much doubt that it has adopted a powerful evidentiary preference that has no proper foundation of any kind. It also is undeniable that this preference precludes ordinary substantial evidence review and eliminates the necessity of reviewing medical evidence for scientific reliability. Both the Supreme Judicial Court of Massachusetts and Professor Davis found these effects central to the operation of a treating doctor preference. *See Canavan's Case*, 733 N.E.2d 1042 (Mass. 2000); Davis and Pierce, *Administrative Law Treatise* § 11.3 at 199 (3d ed. 1994) ("The treating physician rule is totally inconsistent with the substantial evidence test.").

However the court characterizes its rule, it is a strong preference based on status that is not permitted elsewhere or appropriate for black lung claims.

B. The Treating Doctor Rule Is Not Authorized

The petition for writ of certiorari in *Groves* details the Department of Labor's failed search for a medical justification for any treating doctor rule. Groves Petition at 19-24. The statement of the American College of Chest Physicians is representative of the comments DOL received but rejected:

> We agree that some opinions should be considered to carry more weight than others. Opinions that carry the most weight should be based on the competence of the physician and the competence of the opinion that was written. Everything else (the duration of the relationship between the doctor and the miner or the extent of the treatments) is irrelevant. This is an important error in the proposed regulations which must be corrected in this amended version of the black lung regulations.

Exhibit 5-165 to Department of Labor Rulemaking Record, 20 C.F.R. Part 718, *et al.* ("Comments on Proposed Rule: Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended" (Aug. 20, 1997)).

Neither is there any legal mandate for this rule. It is a purely arbitrary formulation that conflicts not only with sections 7(c) and 12 of the APA, 5 U.S.C. §§ 556(d), 559, but with principles of fair play in litigation.

The court of appeals' refinement of its rule in Gray's case overturns an ALJ's decision that obviously is supported by substantial evidence solely because the ALJ failed to apply the treating doctor rule. The result is legally indefensible and will dramatically upset employers'

expectation of even-handed, fair treatment of the evidence they offer in the defense of black lung claims.

C. The Court of Appeals Decision Dramatically Upsets the Expectations of Employers and Insurers and May Make the Black Lung Program Unaffordable and Unmanageable

The significant adverse consequences of a treating doctor preference are set forth in the Groves Petition at 27-30. The Groves Petition also echoes the voices of many authorities, including the California researchers who reviewed that state's now amended treating doctor rule, raised in criticism of the rule. The decision in *Gray* makes matters worse. It is a mandate that seems to enforce an adjudicator's adherence to the treating doctor's opinion if the opinion merely meets the standard for admissibility.

This iteration of the rule will have a profound effect on the decision-making process before ALJs and the Department's Benefits Review Board, and an equally profound economic impact on mine operators in states within the Sixth Circuit's jurisdiction.

In a black lung claim, the treating doctor offers an opinion on all medical elements bearing on an entitlement inquiry. If that doctor's opinions are compelling as a matter of law no matter what else is in the evidentiary record, the federal black lung program surely will bring economic devastation to the mining industry in Sixth Circuit states and the communities that depend upon it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
800 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20006
(202) 533-2361

APPENDIX
TABLE OF CONTENTS

Document	Page
Opinion of the United States Court of Appeals for the Sixth Circuit filed April 19, 2002	App. 1
Order on Motion for Reconsideration of the United States Department of Labor, Benefits Review Board, dated December 20, 2000	App. 8
Decision and Order of the United States Department of Labor, Benefits Review Board, dated November 6, 2000	App. 10
Decision and Order of the United States Department of Labor, Administrative Law Judge denying benefits, dated September 20, 1999	App. 16
Opinion of the United States Court of Appeals for the Sixth Circuit, denying petition for rehearing and suggestion for rehearing en banc, filed July 26, 2002	App. 34
5 U.S.C. § 556(d)	App. 36
5 U.S.C. § 706	App. 36
30 U.S.C. § 923(b)	App. 37
33 U.S.C. § 919(d)	App. 39
33 U.S.C. § 921(c)	App. 40
20 C.F.R. § 718.104(d)	App. 41

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

No. 01-3083

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT D. GRAY,	)
Petitioner-Appellant,	)
v.	) ON PETITION FOR REVIEW OF ANY ORDER OF THE BENEFITS REVIEW BOARD
PEABODY COAL CO., OLD REPUBLIC INSURANCE COS., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	) OPINION FILED APR 19, 2002
Respondents-Appellees.	)

Before: DAUGHTREY and MOORE, Circuit Judges; ECONOMUS,* District Judge.

KAREN NELSON MOORE, Circuit Judge. The Benefits Review Board ("the Board") affirmed the decision of the administrative law judge ("ALJ") denying petitioner Robert Gray's claim for federal black lung benefits. Proceeding *pro se*, Gray appeals. Because the ALJ in the present case erred in weighing the medical opinion evidence, we GRANT the petition for review and REMAND for further proceedings consistent with this opinion.

---

* The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

I.

Gray worked in qualifying employment for a total of twenty-six years. He was last employed as a mechanic in a surface-mining operation in Kentucky, retiring from that position in 1989. In that year, Gray applied for black lung benefits, but his claim was denied by the Office of Workers' Compensation Programs ("OWCP") upon a finding that Gray did not suffer from pneumoconiosis and was not totally disabled. Gray did not appeal the OWCP's denial of his claim at that time.

Gray filed a new claim for black lung benefits in 1997, claiming that his condition had worsened since his original claim was denied. The OWCP granted benefits on March 13, 1998, and affirmed this decision on July 9, 1998. The responsible employer, Peabody Coal Co. ("Peabody"), then requested a formal hearing before an ALJ. After examining the medical evidence, the ALJ concluded that Gray could bring this duplicate claim because there had been a material change in Gray's condition since the OWCP denied his 1989 claim. Specifically, the ALJ concluded that, based on the weight of the pulmonary function study evidence, Gray was totally disabled. *See* 20 C.F.R. § 718.204(b)(2). The ALJ also concluded, however, that Gray had not established the presence of pneumoconiosis and thus he was not eligible for black lung benefits.

In reaching this conclusion, the ALJ first considered a number of conflicting x-ray reports. Although ten of the eighteen relevant x-ray reports submitted by the parties were positive for pneumoconiosis as opposed to only eight negative reports, the ALJ noted that six of the reports performed by the most highly qualified readers – those readers who were both board-certified radiologists and

B-readers – were negative for pneumoconiosis as opposed to only three positive reports by such readers. On this evidence, the ALJ concluded that Gray had failed to establish the presence of pneumoconiosis through x-ray evidence. *See id.* § 718.202(a)(1).

The ALJ next considered the medical opinions submitted by the parties. The ALJ noted that Dr. Simpao, Gray's treating physician, and another physician had diagnosed Gray as suffering from pneumoconiosis, but that pulmonary specialists in the employ of Peabody had reached the contrary conclusion. The ALJ decided to give the most weight to the opinions of Drs. Branscomb and Fino, two expert pulmonologists employed by Peabody, and thus concluded that Gray had failed to establish pneumoconiosis through reasoned medical opinions. *See id.* § 718.202(a)(4). The ALJ concluded:

> The opinions of Drs. Branscomb and Fino are entitled to the most weight since both of these physicians hold board certifications in specialties relevant to the matter at hand. I found the opinions of Drs. Simpao, O'Bryan, and Selby to be well documented and well reasoned, but there is no reason to give them any additional weight. . . . Since I find no reason to credit the opinions which support a finding of pneumoconiosis over those that do not support this finding, Claimant has failed to establish the presence of pneumoconiosis. . . .

ALJ Op. at 11. The physicians concluding that Gray did not suffer from pneumoconiosis attributed his condition to his smoking history; the record established that Gray smoked at least a pack of cigarettes a day for a period of at least forty years. Despite finding that Gray was totally

disabled, the ALJ thus held that Gray had failed to establish the existence of pneumoconiosis and hence his eligibility for black lung benefits.

Gray appealed to the Board, which affirmed the ALJ's decision. The Board first concluded that the ALJ properly gave greater weight to the x-ray readings of the more qualified physicians, i.e., the B-readers and board-certified radiologists, and observed that there were no positive x-ray readings by physicians who had both of these credentials. The Board next concluded that the ALJ properly credited the medical opinions of Drs. Branscomb and Fino, based on their superior qualifications, over those of the other physicians because of the former's superior credentials. Although Drs. Branscomb and Fino did not review all of the x-ray reports in the record in determining that Gray does not suffer from pneumoconiosis, the Board noted that Drs. Branscomb and Fino reviewed a number of x-ray reports, on which they based their opinions, and that their opinions were similar to those of Drs. O'Bryan and Selby, physicians who actually examined Gray. Based on these conclusions, the Board held that the ALJ's denial of benefits was supported by substantial evidence and thus affirmed the ALJ's decision.

The Board rejected Gray's argument that Dr. Simpao's opinion was entitled to greater weight because he was Gray's treating physician. In making this argument, Gray relied on this court's opinion in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir. 1993). The Board held that the ALJ had a proper basis for giving more weight to the opinions of Drs. Branscomb and Fino than those of Dr. Simpao, and thus that the ALJ had not erred in reaching its conclusion. The Board also rejected Gray's arguments (1) that the opinions of Drs. Branscomb and Fino should

have been given less weight because they never actually examined him and (2) that Drs. Branscomb and Fino acted as "hired judges" for Peabody.

Gray made a motion to reconsider, which the Board denied on December 20, 2000. This appeal followed.

II.

Our review of the Board's decisions is very narrow. We will affirm its decisions unless the Board committed legal errors in reaching them or exceeded the scope of its own powers to review the decisions of the ALJ. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 833 (6th Cir. 2002) "The ALJ's findings are conclusive if they are supported by substantial evidence and are in accordance with the applicable law." *Id.*

Having reviewed the record, we conclude that the ALJ in the present case erred in weighing the medical opinion evidence. We held in *Tussey* "that opinions of treating physicians are entitled to greater weight than those of non-treating physicians." *Tussey*, 982 F.2d at 1042. In *Groves,* we recently followed *Tussey* in affirming the award of benefits where the ALJ had determined that the treating physician's medical opinion was more credible than those of non-treating physicians.[1] *See Groves,* 277 F.3d at 834-35. In reaching this conclusion, we noted that *Tussey* does not mean "that treating physicians should automatically be presumed to be correct." *Id.* at 834. Instead,

[1] Coincidentally, the ALJ in *Groves* had decided to discount the opinions of Drs. Branscomb and Fino, the same experts involved in the ALJ's decision in the present case.

Groves held that "*Tussey* requires ALJs in black lung cases to examine the medical opinions of treating physicians on their merits and to make a reasoned judgment about their credibility." *Id.* at 834. In short, our precedents establish that the medical opinions of treating physicians must be accorded additional weight where the ALJ finds them to be well reasoned and credible on the merits.

Thus, an ALJ may discount a treating physician's opinion where that opinion is not well reasoned or well documented, or is problematic in some other way. *See, e.g., Griffith v. Dir., Office of Workers' Comp. Progs.*, 49 F.3d 184, 186-87 (6th Cir. 1995) (holding that the ALJ did not err in discrediting treating physician's opinion where that opinion was equivocal as to the existence of pneumoconiosis). But where the ALJ determines, as in the present case, that a treating physician's opinion is credible, the ALJ must give more weight to the treating physician's opinion than to those of non-treating physicians.

In the present case, however, the ALJ determined that "there is no reason to give [Dr. Simpao's opinion] any additional weight," despite his conclusion that Dr. Simpao's opinion was "well documented and well reasoned." It was error, under these circumstances, not to give additional weight to the opinion of Dr. Simpao, based on his status as treating physician. In affirming the ALJ's decision, the Board concluded that the ALJ provided a reasonable explanation for his decision to credit the opinions of Peabody's experts over Dr. Simpao's, namely the superior qualifications of the experts. It is true that the superior qualifications of experts should be taken into account and that, in many cases, these qualifications will justify giving these experts' opinions additional weight. But in the present case, the Board failed to consider that the ALJ did

not provide reasons for failing to give the treating physician's opinion additional weight. Where the ALJ determines that the treating physician's opinion is well reasoned and well documented, the ALJ must give more weight to that opinion than to those of other physicians, even where those other physicians have superior qualifications.

On remand, the ALJ must reweigh the evidence after giving the opinion of Dr. Simpao additional weight based on his status as Gray's treating physician. In addition, the ALJ must reconsider the weight initially given to the opinions of Drs. Branscomb and Fino. Neither Dr. Branscomb nor Dr. Fino reviewed all of the relevant x-ray reports, and it appears to us that neither expert considered the three positive x-ray reports by Dr. Brandon, a B-reader and board-certified radiologist. The ALJ may determine that, despite these physicians' superior qualifications, their opinions should be discounted where those opinions are based on an incomplete record that omits apparently credible x-ray reports favoring the claimant.

Because we grant the petition on this basis, we do not reach the other issues Gray raises on appeal.

III.

For the foregoing reasons, we GRANT the petition for review and REMAND for further proceedings consistent with this opinion.

U.S. Department of Labor Benefits Review Board
P. O. Box 37601
Washington, DC 20013-7601

(SEAL)

BRB No. 00-0109 BLA

ROBERT D. GRAY, SR., Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
and	)	DEC 20, 2000
OLD REPUBLIC INSURANCE COMPANY, Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	

ORDER ON MOTION FOR RECONSIDERATION

As no member of the panel has affirmatively voted to vacate or modify the decision herein, the motion for

reconsideration filed by claimant is DENIED. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b), 802.407(a), 802.409.[2]

By Order of the Board:

s/_____
Thomas O. Shepherd, Jr.
Clerk of the Board

---

[2] Further review of the disposition of the instant case may be obtained by appeal to the United States Court of Appeals of the appropriate circuit.

U.S. Department of Labor

Benefits Review Board [SEAL]
P. O. Box 37601
Washington, D.C. 20013-760

BRB No. 00-0109 BLA

ROBERT D. GRAY, SR., Claimant-Petitioner	)	
v.	)	NOT-PUBLISHED
PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY, Employer/Carrier-Respondents	)	DATE ISSUED: NOV 6 2000
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	

DECISION AND ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus and Harold H. Davis, Jr. (Arter & Hadden LLP), Washington, D.C., for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-1262) of Administrative Law Judge Rudolf L. Jansen denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The instant case involves a 1997 duplicate claim.[1] The administrative law judge initially found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 1997 claim on the merits. The administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Employer responds in support of the administrative law judge's denial of

[1] The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on April 25, 1989. Director's Exhibit 35. The district director denied benefits on October 12, 1989 and November 27, 1989. *Id.* There is no indication that claimant took any further action in regard to his 1988 claim.

Claimant filed a second claim on November 12, 1997. Director's Exhibit 1.

benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In determining whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. See *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9-10. Of the ten x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists, only three are positive for pneumoconiosis.[3] Director's Exhibits 15, 31, 33,

---

[2] Inasmuch as no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Dr. Sargent, a B reader and Board-certified radiologist, interpreted claimant's May 25, 1989 and November 25, 1997 x-rays as negative for pneumoconiosis. Director's Exhibits 15, 35. Dr. Spitz, a similarly qualified physician, interpreted claimant's March 6, 1999 x-ray as negative for pneumoconiosis. Employer's Exhibit 5. There are no positive interpretations of these x-rays rendered by physicians dually qualified as B readers and Board-certified radiologists.

(Continued on following page)

35; Claimant's Exhibits 2, 8; Employer's Exhibits [sic] 5. Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant also argues that the administrative law judge erred in finding the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge properly credited the opinions of Dr. [sic] Branscomb and Fino that claimant did not suffer from pneumoconiosis over the contrary opinions of Drs. Simpao and Myers based upon the superior qualifications of Drs. Branscomb and Fino.[4] *See Dillon v. Peabody Coal Co.*, 11

Dr. Brandon, a B reader and Board-certified radiologist, interpreted claimant's April 7, 1998, January 12, 1999 and March 11, 1999 x-rays as positive for pneumoconiosis. Claimant's Exhibits 2, 8. However, two equally qualified physicians, Drs. Wiot and Sargent, interpreted claimant's April 7, 1998 x-ray as negative for pneumoconiosis. Director's Exhibits 31, 33. Dr. Spitz, a similarly qualified physician rendered a negative interpretation of claimant's January 12, 1990 and March 11, 1999 x-rays. Employer's Exhibit 5.

[4] Dr. Branscomb is Board-certified in Internal Medicine. Employer's Exhibit 1. Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 2. The qualifications of Drs. Simpao and Myers are not found in the record.

Claimant contends that Dr. Simpao's opinion is entitled to greater weight based upon his status as the miner's treating physician. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that the opinions of treating physicians are entitled to greater weight than those of non-treating physicians. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). However, because the

(Continued on following page)

BLR 1-113 (1988); Decision and Order at 11; Director's Exhibits 13, 35; Employer's Exhibits 1, 2, 6; Claimant's Exhibit 1.

Claimant contends that the opinions of Drs. Branscomb and Fino should have been accorded less weight because these physicians did not examine claimant.[5] We disagree. The Board has held that an administrative law judge cannot discredit the report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In determining the weight to be accorded a physician's opinion, an administrative law judge may properly take into consideration the fact that a physician has not personally examined the miner, but he is not required to discredit the opinion on that basis.[6] *See Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984).

Claimant also asserts that Drs. Branscomb and Fino acted as "hired judges" for employer. Claimant's Brief at 8. There is no logical basis for assuming that evidence prepared in anticipation of litigation is less reliable or

---

administrative law judge provided a proper reason for crediting the opinions of Drs. Branscomb and Fino over that of Dr. Simpao, the administrative law judge was not required to mechanistically give greater weight to Dr. Simpao's opinion. *See generally Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

[5] Claimant also contends that Drs. Branscomb and Fino did not "review all of the evidence of record." Claimant's Brief at 7. We note that Drs. Branscomb and Fino engaged in a comprehensive review of the evidence of record. *See* Employer's Exhibits 1, 2, 6.

[6] We note that the opinions of Drs. Branscomb and Fino corroborate the opinions of two examining physicians, Drs. O'Bryan and Selby. *See* Director's Exhibit 29; Employer's Exhibit 4.

unfairly slanted in favor of the party presenting it. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Unless the physicians retained by the parties are properly held to be biased, based on the evidence in the record, the administrative law judge may not accord less weight to their opinions based upon their party affiliation. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). Claimant has not pointed to any evidence of bias in the instant case.

Inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

S/ _____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

S/ _____
ROY P. SMITH
Administrative Appeals Judge

S/ _____
MALCOLM D. NELSON, Acting
Administrative Appeals Judge

U.S. Department of Labor

Office of Administrative
Law Judges
525 Vine Street, Suite 900
Cincinnati, OH 45202

[SEAL]

Telephone: (513) 684-3252
Facsimile: (513) 684-6108

Date Issued: September 20, 1999

Case No: 1998-BLA-1262

In the Matter of

ROBERT D. GRAY, SR.

Claimant

v.

PEABODY COAL COMPANY

Employer

OLD REPUBLIC INSURANCE COMPANY

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Ronald K. Bruce, Esq.
Madisonville, Kentucky
For Claimant

Philip J. Reverman, Jr., Esq.
Boehl, Stopher & Graves
Louisville, Kentucky
For the Employer/Carrier

Theresa Ball, Esq.
U.S. Department of Labor
Office of the Solicitor
Nashville, Tennessee
For the Director

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq*. Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On August 28, 1998, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Madisonville, Kentucky on June 10, 1999. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. They also are based upon my observation of the appearance and demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the Claimant's medical condition. The Act's implementing regulations are located in Title 20

of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to "DX", "EX", and "CX" refer to the exhibits of the Director, Employer, and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number. Medical evidence was timely submitted post-hearing. Claimant submitted x-ray readings from Dr. Baker and Dr. Brandon. These are hereby received into evidence as CX 8 and CX 9, respectively. Employer submitted a report from Dr. Selby, x-ray readings from Dr. Spitz, and a report from Dr. Fino. These are hereby received into evidence as EX 4, 5, and 6 respectively.

ISSUES

The following issues remain for resolution:

1. Whether the evidence establishes a material change in condition pursuant to Section 725.309(d);

2. Whether Claimant has pneumoconiosis as defined by the Act and regulations;

3. Whether Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether Claimant is totally disabled; and

5. Whether Claimant's disability is due to pneumoconiosis.

The Employer also contests other issues relating to the constitutionality of the Act and regulations. These issues are beyond the authority of an administrative law judge and are preserved for appeal purposes only.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

Claimant, Robert D. Gray, Sr., was born on November 24, 1926. He married Wilda Nannie on March 17, 1972 and they reside together. They had no children who were under eighteen or dependent upon them at the time this claim was filed. (DX 1).

Claimant's symptoms include shortness of breath, productive cough, and difficulty sleeping. (Tr. 16-20). He quit his job due to breathing problems in 1989. (Tr. 16). He uses a breathing machine, an inhaler, cough medicine, and other breathing medication on a daily basis. (Tr. 18). He felt as though he could no longer perform his last coal mining job due to shortness of breath when he quit. (Tr. 21-24). Claimant testified that he smoked for forty years before he quit in March of 1989 on the advice of his doctor. (Tr. 21, 25). However, Claimant apparently told Dr. Simpao that he smoked a pack per day for fifty-eight years and Dr. O'Bryan that he had a sixty-nine pack year smoking history. (DX 29 and DX 13). I find that Claimant's smoking history was significantly greater than forty pack years.

I found Claimant to be a credible witness excepting as to his smoking history.

Claimant filed his application for black lung benefits on November 12, 1997. The Office of Workers' Compensation Programs granted benefits on March 13, 1998, and, after reviewing additional evidence, affirmed its decision on July 9, 1998. Pursuant to Employer's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 36).

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. At the hearing, the parties stipulated that Claimant worked twenty-six years in qualifying above ground coal mine work. Based upon my review of the record, I accept the stipulation as accurate and credit Claimant with twenty-six years of coal mine employment.

Claimant's last coal mining job was as a mechanic. (Tr. 13). The heaviest lifting he did at this job involved one hundred pound loads. (Tr. 14). He was also required to use sledgehammers, which weighed approximately twenty pounds and to climb. (Tr. 14). Claimant testified that he was exposed to a significant amount of coal dust. (Tr. 15).

Duplicate Claim

Claimant's previous claim for benefits was denied on November 27, 1989. As a result, the claim involved in this proceeding, filed on November 12, 1997, constitutes a "duplicate claim" under the regulations. The provisions of Section 725.309(d) apply to duplicate claims and are intended to provide relief from the traditional notions of *res judicata*. Under Section 725.309(d), duplicate claims "must be denied on the grounds of the prior denial unless the evidence demonstrates "a material change in condition." 20 C.F.R. § 725.309(d). The United States circuit courts of appeals have developed divergent standards to determine whether "a material change in conditions" has occurred. Because Claimant last worked as a coal miner in the state of Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to

this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

Under the Sixth Circuit's approach, an administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether it proves at least one of the elements of entitlement that formed the basis for the prior denial.[1] If the new evidence establishes the existence of one of these elements, it will demonstrate a material change in condition as a matter of law. Then, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994). *See Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996).

In the denial of Claimant's prior claim, the Office of Workers' Compensation Programs determined that the evidence failed to establish pneumoconiosis or total disability. If the newly-submitted evidence establishes one of these elements, it will demonstrate a material change in condition. Then, I must review the entire record to determine entitlement to benefits. *See Ross*, 42 F.3d at 997-98.

---

[1] A "determination that the miner's physical condition has worsened is a requisite part of the duplicate claim analysis". *Flynn v. Grundv* [sic] *Mining Co.*, 21 BLR 1-40, 1-43 (1997). Thus, Claimant cannot establish a material change in condition based solely on a showing that his pneumoconiosis arose out of coal mine employment or that his total disability is due to pneumoconiosis.

MEDICAL EVIDENCE

X-ray reports

Exhibit	Date of X-ray	Date of Reading	Physican/ Qualifications	Interpretation
DX 12	4/4/95	4/4/95	Galuten	COPD and old granulomatous disease
DX 12	7/18/96	7/18/95	Westmoreland	COPD
DX 12	10/29/97	10/29/97	Westmoreland	COPD
DX 15	11/25/97	12/29/97	Sargent (BR/BCR)	Negative
DX 16	11/25/97	12/1/97	Simpao	2/1
DX 29	4/7/98	4/7/98	O'Bryan (BR)	Negative
DX 31	4/7/98	5/1/98	Wiot (BR/BCR)	Negative
DX 33	4/7/98	5/30/98	Sargent (BR/BCR)	Negative
CX 8	4/7/98	7/5/99	Brandon (BR/BCR)	2/2
CX 9	4/7/98	7/14/99	Baker (BR)	1/0
CX 1	1/12/99	2/26/99	Myers	1/1
CX 2	1/12/99	3/7/99	Brandon (BR/BCR)	2/2
CX 3	1/12/99	1/29/99	Houser	1/1
CX 4	1/12/99	4/21/99	Baker (BR)	1/0
CX 1	3/6/99	3/6/99	Myers	1/2
EX 5	3/6/99	6/30/99	Spitz (BR/BCR)	Negative
EX 4	3/11/99	3/11/99	Selby (BR)	Negative
EX 5	3/11/99	6/30/99	Spitz (BR/BCR)	Negative
CX 8	3/11/99	8/4/99	Brandon (BR/BCR)	2/1
CX 9	3/11/99	8/10/99	Baker (BR)	1/0

"BR" denotes a "B" reader and "BCR" denotes a board—certified radiologist. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services (HHS). A board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. ~ 20 C.F.R. § 718.202 (a) (ii) (C). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

Pulmonary Function Studies

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	$FEV_{1/}$ FVC	Tracings	Comments
DX 12/ 10/29/97	Simpao	70/ 71	1.60 1.66*	2.99 3.03*	50 49*	53 55*	No	Good effort and cooperation.
DX 11	Simpao	71/ 69	1.48	2.92	50	51	Yes	Good effort and cooperation.
DX 30 11/25/97	O'Bryan	71/ 69	1.21	2.93	37	41	Yes	Good effort and cooperation.
CX 1 3/6/99	Myers	72/ 70	1.16 1.34*	2.64 2.54*		44 44*	Yes	Valid.
EX 4 3/11/99	Selby	72/ 69	1.29 1.47*	3.13 3.52*	39 36*	41 42*	Yes	Good effort.

*post-bronchodilator values

Arterial Blood Gas Studies

Exhibit	Date	pCO2	pO2	Resting/ Exercise
DX 12	10/29/97	41.3	73.5	
DX 14	11/25/97	39.2	68.3	Resting
DX 29	4/7/98	42.0	74.3	Resting
		43.7	74.8	Exercise
EX 4	3/11/99	42	74	Resting

Narrative Medical Evidence

On January 7, 1998, a physician whose name is illegible opined that the November 25, 1997 pulmonary function study was valid.

On April 7, 1998, Dr. N. K. Burki opined that the April 7, 1998 pulmonary function study is invalid due to a lack of tracings. (DX 30).

On May 39 [sic], 1995, Dr. Valentino S. Simpao examined Claimant. (DX 12 at 9). Claimant reported that he was not as short of breath and could breathe easier and deeper as a result of treatments he was receiving.

On July 18, 1996, Simpao conducted Claimant's annual physical examination. (DX 12 at 7). He noted a fifty year, pack and a half per day cigarette smoking history and a twenty-eight year coal mining history. He noted that Claimant reported the ability to breathe a bit easier since beginning a rehabilitation program. (DX 12 at 7).

On November 11, 1997 Dr. Simpao conducted Claimant's annual physical examination. (DX 12 at 4). Dr. Simpao noted that Claimant reported that he was "doing very well with the exception of a few episodes of shortness of breath." He also noted that Claimant had a moderate restrictive airway disease and a severe obstructive airway disease.

Dr. Simpao examined Claimant on November 25, 1997. (DX 13). He noted a twenty-eight year coal mining history and a fifty-eight year, pack per day cigarette smoking history. He also noted symptomatology and interpreted a chest x-ray, a ventilatory study, and an arterial blood gas study. Dr. Simpao diagnosed coal

workers' pneumoconiosis, resulting in a severe impairment. He opined that Claimant was not capable of performing the work of a coal miner. Dr. Simpao is the Director of the Miners' Respiratory Clinic. (EX 3 at 4).

Dr. William M. O'Bryan examined Claimant on April 7, 1998. (DX 29). He noted a twenty-nine year coal mining history. He diagnosed emphysema and bronchitis, but found no evidence of black lung disease. He attributed Claimant's respiratory condition to his sixty-nine pack year cigarette smoking history. Dr. O'Bryan opined that Claimant's lung impairment is severe and prevents him from performing his last coal mining job. Dr. O'Bryan is a pulmonary specialist. (DX 29).

The record contains a number of records from the Muhlenberg Community Hospital Clinic in which Claimant received pulmonary treatments. I do not find these records to be probative of any of the issues in this claim.

On January 14, 1999, Dr. Ben V. Branscomb reviewed Claimant's medical records. (EX 1). He assumed a sufficient coal mining history to cause coal workers' pneumoconiosis. He also noted the various smoking histories in the record. He opined that the May 25, 1989 and November 25, 1997 pulmonary function studies are invalid. Dr. Branscomb concluded that there is no evidence of coal workers' pneumoconiosis. He diagnosed chronic obstructive pulmonary disease secondary to cigarette exposure. Dr. Branscomb also opined that Claimant's pulmonary function has not deteriorated since 1989 and that a moderate airways obstruction is "likely". (EX 1). Dr. Branscomb is Board Certified in Internal Medicine. (EX 1).

Dr. Gregory J. Fino reviewed the medical evidence on January 28, 1999. (EX 2). He noted the various cigarette

smoking histories in the record. Dr. Fino opined that Claimant does not suffer from coal workers' pneumoconiosis. He found claimant's condition to be consistent with cigarette smoking and stated that his condition would be the same if he had never worked in the coal mines. Dr. Fino opined that Claimant has a severe, disabling ventilatory impairment, but that it is unrelated to coal mining. Dr. Fino reviewed additional evidence on July 22, 1999. (EX 6). His conclusions remained the same. Dr. Fino is Board Certified in Internal Medicine and Pulmonary Disease. (EX 2).

Dr. John E. Myers examined Claimant on March 6, 1999. (CX 1). He noted symptomatology, a twenty-eight year coal mining history, and a forty year, pack per day smoking history. Dr. Myers opined that Claimant has coal workers' pneumoconiosis and chronic obstructive pulmonary disease. He also opined that Claimant "would meet the federal guidelines for disability." Dr. Myers is a physician specializing in internal medicine and is on the active staff of four hospitals. (CX 7).

On March 11, 1999, Dr. Jeff W. Selby examined Claimant. (EX 4). He noted Claimant's coal mining history and a forty pack year smoking history. Dr. Selby opined that Claimant does not suffer from coal workers' pneumoconiosis and that Claimant would have the same pulmonary function if he had never worked in the coal mines. Dr. Selby also opined that Claimant has a severe obstructive lung defect from emphysema and possibly asthma. He stated that Claimant had the respiratory capacity to perform his last coal mining job. Dr. Selby is a pulmonologist.

Deposition Testimony

Dr. Valentino S. Simpao was deposed on January 19, 1999. (EX 3). He opined that Claimant is totally disabled from performing the work of a coal miner. (EX 3 at 11). He testified that he might still diagnose pneumoconiosis in Claimant even if he had read the x-ray as negative. (EX 3 at 12). He also testified to substantially the same conclusions that he stated in his medical reports.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. To establish entitlement to benefits under this part of the regulations, a claimant must prove by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. As noted above, I first must determine whether Claimant has demonstrated a material change in condition under Section 725.309(d) before considering whether the evidence of record establishes entitlement to benefits.

Material Change in Condition

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202 (a) (1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight

to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *Dixon v. North Camp Coal*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

The newly submitted evidence of record contains twenty-one interpretations of eight chest x-rays. Of. these interpretations, eight were negative for pneumoconiosis while ten were positive. Three readings were not performed to determine the presence or absence of pneumoconiosis. Of the positive readings, four were performed by physicians who are neither "B" readers nor Board Certified Radiologists. Of the readings performed by the most highly qualified readers, i.e., those who are both "B" readers and Board Certified Radiologists, six were negative for pneumoconiosis and three were positive for the disease. Because the negative readings are verified by more, highly-qualified physicians, I find that the x-ray evidence fails to support a finding of pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The

presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions apply to this claim, Claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion. Although the x-ray evidence does not establish pneumoconiosis, a physician's reasoned opinion nevertheless may support the presence of the disease if it is explained by adequate rationale besides a positive x-ray interpretation. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, [10 BLR] 1-22, 1-24 (1986). The opinions of Drs. Simpao and Myers support a finding that Claimant has coal workers' pneumoconiosis. The opinions of Drs. O'Bryan, Branscomb, Fino, and Selby support a finding that Claimant does not have coal workers' pneumoconiosis. Dr. Burki did not offer an opinion with respect to this issue.

The opinions of Drs. Branscomb and Fino are entitled to the most weight since both of these physicians hold board certifications in specialties relevant to the matter at hand. I found the opinions of Drs. Simpao, O'Bryan, and Selby to be well documented and well reasoned, but there is no reason to give them any additional weight. Dr. Myer's opinion is entitled to less weight since I find that the smoking history that he utilized underestimated Claimant's true smoking history by a significant amount. Dr. Selby also utilized a deflated smoking history, but he found that Claimant did not have pneumoconiosis despite the fact that he underestimated the likelihood that a

competing irritant may have caused Claimant's condition. Thus, his opinion is not entitled to any less weight. Since I find no reason to credit the opinions which support a finding of pneumoconiosis over those that do not support this finding, Claimant has failed to establish the presence of pneumoconiosis or a material change in condition with respect to this issue. It is possible however, that Claimant could establish a material change in condition by proving that he is now totally disabled from a respiratory standpoint.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(2). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(c) provides several criteria for establishing total disability. Under this section, I first must evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether Claimant has established total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(c)(1) and (c)(2), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies.[2] All of the pulmonary

[2] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table

(Continued on following page)

function studies produced qualifying results. Although the opinions of Dr. Burki and Dr. Branscomb cast doubt upon the validity of the April 7, 1998 and November 25, 1997 studies, respectively, the vast weight of the pulmonary function study evidence still supports a finding of total disability. None of the arterial blood gas studies produced qualifying results.

Section 718.204(c)(3) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.204(c)(4), total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work. The opinions of Drs. Simpao, O'Bryan, Myers, and Fino support a finding of total disability. Dr. Branscomb opined that Claimant likely has a "moderate" airways obstruction. Based upon Claimant's description of his job, he was required to engage in heavy manual labor. Accordingly, I find that Dr. Branscomb's opinion supports a finding of total disability. Dr. Selby opined that Claimant has a "severe" obstructive lung defect, but that he maintains the respiratory capacity to perform his previous coal

---

values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(c)(1), (c)(2). A "non-qualifying" test produces results that exceed the table values.

mining duties. Dr. Burki did not offer an opinion with respect to this issue.

I find all of the medical opinions to be adequately reasoned and documented with respect to this issue. I give less weight to Dr. Selby's opinion since he stated that Claimant could perform his last coal mining job despite a "severe" obstructive defect. This indicates that Dr. Selby did not fully understand the rigorous nature of Claimant's last coal mining job. The other opinions, including those of the Board Certified physicians, unanimously support a finding of total respiratory disability and I so find.

In weighing all of the evidence together, I am presented with pulmonary function study evidence and medical opinion evidence which supports a finding of total disability and arterial blood gas evidence which does not support this finding. I am most persuaded by the unanimous pulmonary function study evidence, which is supported by the most probative medical opinions of record. Accordingly, Claimant has now established that he is totally disabled and thus, has established a material change in condition. I must now review all of the evidence of record to determine entitlement to benefits.

When I add the previously submitted evidence of record to my analysis however, Claimant still fails to establish the presence of pneumoconiosis. There are two positive x-ray readings from 1989, but neither of the interpreting physicians was a "B" reader or a Board Certified Radiologist. (DX 35-34 and DX 35-25). There is a medical opinion from Dr. Simpao in which he opines that Claimant has pneumoconiosis, but I still find no reason to credit his opinion over those of the board certified physicians, Dr. Fino and Dr. Branscomb. (DX 35-32). Despite

demonstrating the presence of total respiratory disability and thus, a material change in condition, Claimant cannot prevail on this claim until he proves that he has coal workers' pneumoconiosis.

ENTITLEMENT

The evidence fails to establish entitlement to benefits under any applicable part of the Act or regulations.

ATTORNEY FEE

The award of an attorney's fee is permitted only in cases where the claimant is found to he entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for representation services rendered in pursuit of the claim. 20 C.F.R. § 725.365.

ORDER

The claim of Robert D. Gray, Sr. for benefits under the Act is denied.

S/ _____
RUDOLF L. JANSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal also must be served on Donald S. Shire,

Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.

No. 01-3083

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT D. GRAY, Petitioner-Appellant, v. PEABODY COAL CO., OLD REPUBLIC INSURANCE COS., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Respondent-Appellees.	)	FILED JUL 26 2002 LEONARD GREEN, Clerk ORDER

Before: DAUGHTREY and MOORE, Circuit Judges; and ECONOMUS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ _____
Leonard Green, Clerk

5 U.S.C. § 556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

---

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

---

33 U.S.C. § 919(d)

(d) Provisions governing conduct of hearing; hearing examiners. Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code [5 USC §§ 554]. Any such hearing shall be conducted by a [an] administrative law judge

qualified under section 3105 of that title [5 USC § 3105]. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 [enacted Oct. 27, 1972], in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

---

33 U.S.C. § 921(c)

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments. Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code [28 USC § 2112]. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the

court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

---

20 C.F.R. § 718.104(d)

(d) Treating physician. In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4) Extent of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

SUPREME COURT, U.S.
JAN 16 2003

No. 02-585

In the Supreme Court of the United States

PEABODY COAL CO., PETITIONER

v.

ROBERT D. GRAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

GARY K. STEARMAN
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the decision of the court of appeals concerning the weight to be accorded the medical opinion of a treating physician in adjudicating a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, is proper and consistent with the allocation of the burden of proof in Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d).

2. Whether the Department of Labor's regulation addressing the opinion of a treating physician, 20 C.F.R. 718.104(d), conflicts with Section 7(c) of the APA or otherwise is arbitrary or capricious or not in accordance with law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Fireman & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	7
Jericol Mining, Inc. v. *Napier*, 301 F.3d 703 (6th Cir. 2002), petition for cert. pending, No. 02-834	6, 7
National Mining Ass'n v. *Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002)	5, 9
Peabody Coal Co. v. *Groves*, 277 F.3d 829 (6th Cir. 2002), cert. denied, No. 02-249 (Jan. 13, 2003)	3, 4, 5
Peabody Coal Co. v. *McCandless*, 255 F.3d 465 (7th Cir. 2001)	5
Sterling Smokeless Coal Co. v. *Akers*, 131 F.3d 438 (4th Cir. 1997)	5
United States v. *Humphrey*, 287 F.3d 422 (6th Cir. 2002)	7
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993)	7
Wolf Creek Collieries v. *Director, OWCP*, 298 F.3d 511 (6th Cir. 2002)	6

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 556(d) (§ 7(c))	9
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*	2
30 U.S.C. 901(a)	2

Regulations—Continued:

	Page
20 C.F.R.:	
Section 718.1	2
Section 718.101(b)	9
Section 718.104(d)	8, 9
Section 718.104(d)(1)-(5)	8
Section 718.104(d)(5)	8, 9
Section 725.309(d)	2

In the Supreme Court of the United States

No. 02-585

PEABODY COAL CO., PETITIONER

v.

ROBERT D. GRAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is not published in the *Federal Reporter*, but is available at 35 Fed. Appx. 138. The decisions and orders of the Benefits Review Board (Pet. App. 8-15, 39-45) and the administrative law judge (Pet. App. 16-34) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2002. A petition for rehearing was denied on July 26, 2002 (Pet. App. 35-36). The petition for a writ of certiorari was filed on October 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 12, 1997, respondent Robert D. Gray, who had been a coal miner for 26 years, Pet. App. 20, filed a claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.* The BLBA provides for payment of benefits to "coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a); 20 C.F.R. 718.1.[1] On September 20, 1999, an administrative law judge (ALJ) denied respondent's claim. Pet. App. 16. The ALJ determined that Gray did not suffer from pneumoconiosis.

The ALJ reached that conclusion on the basis that the weight of the x-ray evidence failed to establish the presence of pneumoconiosis and that the physicians possessing superior medical credentials (Drs. Branscomb and Fino) opined that Gray's respiratory condition was unrelated to coal mine employment. Pet. App. 28-29. Dr. Simpao, respondent's treating physician, made a contrary diagnosis of coal workers' pneumoconiosis, which the ALJ found to be well documented and well reasoned. *Id.* at 29. Without acknowledging Dr. Simpao's status as the treating physician, the ALJ found "no reason to give [his opinion] any additional weight," because, unlike Drs. Branscomb and Fino, he was not a board certified specialist in internal or pulmonary medicine. *Ibid.* The ALJ also determined, based on the recent medical evidence, that Gray had a totally disabling respiratory condition, but, after considering all the prior and new evidence, he denied

---

[1] Because Gray had filed a previous claim for benefits, the claim at issue in this case was considered a "duplicate claim" requiring a showing of a "material change in condition[s]." Pet. App. 20; see 20 C.F.R. 725.309(d). The ALJ found a material change in conditions. Pet. App. 32.

benefits because the disability was not due to pneumoconiosis. *Id.* at 32-33.

2. On November 6, 2000, the Benefits Review Board (Board) issued a per curiam decision affirming the ALJ's denial of benefits. Pet. App. 10-15. The Board ruled that the ALJ had properly accorded greater weight to the medical opinions of the physicians with superior medical credentials. According to the Board, the ALJ was not required "to mechanistically give greater weight to Dr. Simpao's opinion" because he was the treating physician, or to discredit the reports of the better-credentialed physicians simply because they had not examined the claimant. *Id.* at 13-14 & n.4.

3. The court of appeals remanded in an unpublished opinion. Pet. App. 1-7. According to the court, the ALJ had "erred in weighing the medical opinion evidence." *Id.* at 5. In particular, the court found, the ALJ had failed to accord proper weight to the opinion of the treating physician, Dr. Simpao.

The court explained that its previous decisions did not mean "that treating physicians should automatically be presumed to be correct." Pet. App. 5 (quoting *Peabody Coal Co.* v. *Groves*, 277 F.3d 829, 834-835 (6th Cir. 2002), cert. denied, No. 02-249 (Jan. 13, 2003)). Instead, the court observed, ALJs must "examine the medical opinions of treating physicians on their merits and * * * make a reasoned judgment about their credibility." Pet. App. 6 (quoting *Groves*, 277 F.3d at 834). As a result, "an ALJ may discount a treating physician's opinion where that opinion is not well reasoned or well documented, or is problematic in some other way." Pet. App. 6. But "[w]here the ALJ determines that the treating physician's opinion is well reasoned and well documented," the court stated, "the ALJ must give more weight to that opinion than to those of other

physicians, even where those other physicians have superior qualifications." *Id.* at 7.

In this case, the court found, the ALJ should have given additional weight to the treating physician's opinion after having determined that the opinion was well documented and reasoned. Pet. App. 7. The court therefore directed the ALJ to reweigh the evidence after giving additional weight to Dr. Simpao's opinion, and to reconsider the weight initially given to the opinions of the non-treating specialists, Drs. Branscomb and Fino, in light of their failure to consider all the relevant x-ray reports, including three "apparently credible x-ray reports favoring the claimant." *Ibid.*

ARGUMENT

Petitioner seeks this Court's review of both the court of appeals' decision concerning the opinion of a treating physician in BLBA adjudications and the Department of Labor's new regulation addressing treating physicians' opinions. Review of petitioner's claims is not warranted. As petitioner acknowledges (Pet. i n.*), in *Peabody Coal Co.* v. *Groves*, *supra*, which also arose from the Sixth Circuit, petitioner raised the same two questions that it now raises in this case. The Court denied the petition for certiorari in *Groves*, and there is no reason for a different result here.

1. Petitioner asserts (Pet. 10-14) that the approach of the Sixth Circuit concerning the opinion of a treating physician conflicts with the approach of other courts of appeals. That contention lacks merit and does not warrant this Court's review.

a. The courts of appeals, including the Sixth Circuit, are in agreement that there is no automatic presumption favoring the opinion of a treating physician, but that the treating physician's opinion, if adequately

documented and supported, may be entitled to controlling weight where justified by the record in a particular case because the treatment relationship might afford the physician superior insight into the claimant's condition. Accordingly, the District of Columbia Circuit, in reviewing the decisions of the courts of appeals, found a "consensus among [the] courts * * * that an agency adjudicator may give weight to the treating physician's opinion when doing so makes sense in light of the evidence and the record, but may not mechanistically credit the treating physician solely because of his relationship with the claimant." *National Mining Ass'n (NMA)* v. *Department of Labor*, 292 F.3d 849, 861 (2002) (per curiam). In concluding that the courts of appeals agree in their approach to the opinions of treating physicians, the District of Columbia Circuit relied on essentially the same decisions relied on by petitioner. See *id.* at 861-862 (discussing *Sterling Smokeless Coal Co.* v. *Akers*, 131 F.3d 438 (4th Cir. 1997); *Peabody Coal Co.* v. *McCandless*, 255 F.3d 465 (7th Cir. 2001); and *Groves*, 277 F.3d at 829); Pet. 3-4, 10-12.

In this case, the ALJ failed to consider whether Dr. Simpao's opinion as the treating physician was entitled to additional weight in light of the evidence and the record. The ALJ took no note of Dr. Simpao's status as treating physician, instead stating only that "there is no reason to give [his opinion] any additional weight." Pet. App. 29. Because the ALJ apparently did not consider the nature of the treatment relationship and whether it could have afforded Dr. Simpao superior insight into Gray's medical condition, the Sixth Circuit properly remanded for a reweighing of the medical opinions.

The court of appeals' opinion goes on to suggest, however, that the opinion of a treating physician, if well

documented and reasoned, necessarily must be given more weight than the opinion of other physicians, regardless of the evidence and the record. Pet. App. 5-7. That suggestion is not consistent with the court's approach in subsequent precedential decisions.

In *Wolf Creek Collieries* v. *Director, OWCP*, 298 F.3d 511 (6th Cir. 2002), issued more than three months after the court of appeals' decision in this case, the court specifically denied the existence of an automatic presumption favoring the opinion of a treating physician. The court made clear that "the misconceived 'treating physician presumption' does not exist, and we have never mandated that automatically controlling weight be accorded such opinion." *Id.* at 521. The court affirmed the ALJ's decision to give greater weight to the treating physician's opinion in that case because the treating physician had examined the miner on "numerous occasions" in the years preceding his death, whereas other physicians had not examined the miner at all or had examined him on only one occasion several years before his death. *Id.* at 522. The court explained that it was "thus clear that the ALJ did not give presumptive weight to [the treating physician's] opinion. While he did accord more weight to his opinion, he examined all of the opinions and made reasoned judgments as to their credibility." *Ibid.*

More recently, in *Jericol Mining, Inc.* v. *Napier*, 301 F.3d 703 (6th Cir. 2002), petition for cert. pending, No. 02-834, the court "rejected the contention that [an ALJ is] require[d] * * * to give absolute deference to the opinion of a treating physician." *Id.* at 709 (citation omitted); see *ibid.* (describing as "mistaken" the "belief that an automatic treating-physician presumption exists"). Of particular significance, the court specifically held that the ALJ had erred by giving "extra

weight" to the opinion of a treating physician based solely on the existence of the physician-patient relationship, without considering "the factors that are relevant in determining whether her opinions as [the] treating physician are entitled to greater weight, considerations such as the nature and duration of the relationship, as well as the frequency and extent of the treatment." *Id.* at 710.

Napier and *Wolf Creek* establish that the Sixth Circuit does not exhibit a "strong preference based on status" alone. Pet. 14. Instead, the opinion of a treating physician may be entitled to added weight if the evidence and the record in a particular case warrant that conclusion. Moreover, whereas *Napier* and *Wolf Creek* are published and establish circuit precedent, the decision below is not published and therefore does not establish precedent. See, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 451 (6th Cir. 2002). The Sixth Circuit's approach, as *Napier* makes clear, thus is "in line with the views of [its] sister circuits that have considered the relevance of a treating physician's opinion." *Napier*, 301 F.3d at 709. As a result, there is no conflict warranting this Court's review.

b. Even if there were a conflict among the courts of appeals, this case would not present an appropriate vehicle for addressing the issue. As a general matter, this Court awaits a final decision before granting certiorari in a case. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J. respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Brotherhood of Locomotive Fireman & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this

Court."). In this case, the court of appeals remanded the case to the ALJ for further consideration of the claim.

There is no reason in this case to depart from the Court's general practice of awaiting final judgment. The denial of certiorari at this time would not preclude petitioner from raising the same issues in a later petition, after the Board renders a final decision on remand. Moreover, the remand affords the ALJ the opportunity to assess in the first instance, and for the first time, whether Dr. Simpao's treatment relationship might have afforded him superior insight into the claimant's medical condition in the particular circumstances of this case.

c. The Sixth Circuit's decision does not warrant review for the added reason that, in BLBA cases in which the evidence was developed after January 19, 2001, the weight to be accorded the opinion of a treating physician is governed by the Department of Labor's treating physician regulation, 20 C.F.R. 718.104(d). The regulation requires the adjudication officer to "take into consideration" a number of specific factors "in weighing the opinion of the miner's treating physician" —*viz*, the "[n]ature of the relationship" between the physician and the miner in respect to whether the physician "treated the miner for respiratory or pulmonary conditions," the "[d]uration of [the] relationship," the "frequency of physician-patient visits," and the "types of testing and examinations conducted during the treatment relationship." 20 C.F.R. 718.104(d)(1)-(5). The regulation provides that, "[i]n appropriate cases, the relationship between the miner and his treating physician *may* constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight," but

only "provided that the weight given to the [physician's] opinion * * * shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. 718.104(d)(5) (emphasis added). Because the regulation will govern in all BLBA cases in which the evidence was developed after January 19, 2001, any flaw in the Sixth Circuit's approach in this case—and any disagreement between the opinion below and the decisions of other courts of appeals—is of little (and diminishing) continuing significance.

2. Petitioner also seeks review on the basis (Pet. i, 15-16) that the Department's treating physician regulation, 20 C.F.R. 718.104(d), is arbitrary and capricious and is in conflict with Section 7(c) of the APA. The regulation only applies in cases in which the evidence was developed after January 19, 2001, however, and thus has no application to this case. 20 C.F.R. 718.101(b). Accordingly, the court of appeals' opinion does not rely on, or even mention, the regulation. There thus is no basis for reviewing the regulation's validity in this case.

In addition, there is no disagreement among the courts of appeals on the validity of the regulation under the APA. The District of Columbia Circuit upheld the regulation against a facial challenge, *NMA*, 292 F.3d at 870-871, and no court has reached a contrary conclusion. The regulation's application in a particular case has yet to be reviewed by any court of appeals.[2]

---

[2] For the reasons explained in the government's brief in opposition (at 12-16) in *Groves*, No. 02-249, moreover, there is no merit to petitioner's argument that the treating physician regu-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

HOWARD M. RADZELY
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Deputy Associate Solicitor

GARY K. STEARMAN
Attorney
Department of Labor

JANUARY 2003

---

lation is arbitrary and capricious or inconsistent with Section 7(c) of the APA.

(3)

Supreme Court, U.S.
FILED
FEB 14 2003

No. 02-585

In The
Supreme Court of the United States

PEABODY COAL COMPANY,

Petitioner,

v.

ROBERT D. GRAY
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
Suite 500
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 553-2361

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUPPLEMENTAL BRIEF	1

TABLE OF AUTHORITIES

Page

CASES:

Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359 (1998) 4, 5

Black & Decker Disability Plan v. Nord, No. 02-469 ..... 1, 2

Consolidation Coal Co. v. Held, 314 F.3d 184 (4th Cir. 2002) 4

Darland v. Fortis Benefits Ins. Co., ___ F.3d ___, 2003 WL 141620 (6th Cir. Jan. 22, 2003) 3

Jericol Mining, Inc. v. Napier, 301 F.3d 703 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3401 (U.S. Nov. 27, 2002) (No. 02-834) 3, 4

Peabody Coal Co. v. Groves, 277 F.3d 829 (6th Cir. 2002), *petition for cert. denied*, 71 U.S.L.W. 3474 (Jan. 13, 2002) (U.S. No. 02-249), *petition for reh'g pending* 2, 3, 4, 5

Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130 (9th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3001 (U.S. No. 01-1840) 2, 3

Tussey v. Island Creek Coal Co., 982 F.2d 1036 (6th Cir. 1993) 2

STATUTES AND REGULATIONS:

Administrative Procedure Act, 5 U.S.C. §§ 551-559 3

Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 3

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 ..... 1, 3

PETITIONER'S SUPPLEMENTAL BRIEF

The Peabody Coal Company respectfully submits this supplemental brief to request that the Court hold the petition for a writ of certiorari filed in this case in abeyance pending this Court's decision on the merits in *Black & Decker Disability Plan v. Nord*, No. 02-469 (*"Nord"*). The decision in *Nord* is highly likely to be dispositive of the matters presented here. The relief requested is warranted and appropriate for the reasons that follow:

1. In this case, the Sixth Circuit reversed a denial of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, because the administrative law judge ("ALJ") failed to follow that court's rule "that opinions of treating physicians are entitled to greater weight than those of non-treating physicians." App. 5. The court of appeals remanded the case for application of this rule.

2. The decision instructs the agency on remand that "the medical opinions of treating physicians must be accorded additional weight where the ALJ finds them to be well reasoned and credible on the merits" and that "[i]t was error . . . not to give additional weight to the opinion of Dr. Simpao based upon his status as treating physician." *Id.* at 5-6.

3. In first adjudicating the case, the ALJ found the treating doctor's opinion was reasoned and documented, but also that it was not the best or strongest opinion and did not overcome the contrary views of more expert physicians. *Id.* at 29, 32. On remand, the ALJ will have no choice but to accept the treating doctor's opinion based upon status alone and award benefits.

4. On January 10, 2003, this Court granted a writ of certiorari in *Nord*. The question presented in *Nord* is: "Whether the Ninth Circuit erred in holding that an ERISA disability plan administrator's determination of disability is subject to the 'treating physician rule' and, therefore, the plan administrator is required to accept the treating physician's opinion of disability as controlling unless the plan administrator rebuts that opinion in writing based upon substantial evidence on the record." Peabody's petition challenges the Sixth Circuit's application of a treating physician rule in federal black lung benefits claims.

5. Both the ERISA rule and the black lung rule require the fact finder to give preferential treatment, if not controlling weight, to a benefit applicant's treating doctor solely because of the physician's status. Both rules originate in SSA disability benefit claims arising in several circuits that accorded extra weight to a treating doctor in determining a claimant's entitlement or degree of disability. *Compare Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1138-39, 1143-44 (9th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3001 (U.S. June 13, 2002) (No. 01-1840) ("We see no reason why the [SSA] treating physician rule should not be used under ERISA") *with Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993) (citing SSA claims determinations as authority for holding "it is clearly established that opinions of treating physicians are entitled to greater weight. . . . "). Moreover, on January 22, 2003, the Sixth Circuit joined the Ninth Circuit in mandating a treating physician rule for ERISA disability claims, citing its decision in *Peabody Coal Co. v. Groves*, 277 F.3d 829 (6th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3474 (Jan. 13, 2003) (U.S. No. 02-249), *petition for reh'g pending*, as the only

Sixth Circuit authority for doing so. *Darland v. Fortis Benefits Insurance Co.*, F.3d, 2003 WL 141620 at *15 (6th Cir. Jan. 22, 2003).

6. Neither the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, nor the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, authorizes a treating doctor rule. In both ERISA and black lung claims, the courts that accept a treating doctor preference rely on a judicially created and unsubstantiated assumption that by having a treating relationship with a patient, a treating doctor acquires significant knowledge not knowable by other experts. *See Darland*, 2003 WL 141620 at *16, *quoting Regula*, 266 F.3d 1130.

7. Although the black lung cases[1] raise additional issues arising under the Administrative Procedure Act, 5 U.S.C. §§ 551-59 ("APA"), and challenge the Department of Labor's adoption of a new treating doctor regulation, there is no meaningful difference between the ERISA rule the Court has elected to review and the black lung rule. The DOL regulation is not supported by science, but is premised on the SSA rule. *See* 65 Fed. Reg. 79931-34 (Dec. 20, 2002). The regulation, therefore, like the Sixth and Ninth Circuit ERISA rules, rests solely on the authority and intellectual force of the SSA rule. The APA issue arises because the treating doctor rule artificially exaggerates

[1] Three black lung cases challenging the Sixth Circuit's application of a treating doctor rule have been petitioned to this Court including this case, *Peabody Coal Co. v. Groves*, No. 02-249 and *Jericol Mining, Inc. v. Napier*, 301 F.3d 703 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3401 (U.S. Nov. 27, 2002) (No. 02-834). A similar request is being made in *Jericol Mining*.

the significance of certain evidence in a manner that has been disapproved by this Court in APA adjudications. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998). Whether or not the APA applies, however, the black lung rule shares much common legal ground with the ERISA rule and is predicated upon an identical rationale.

8. In opposition to Peabody's petition, the U.S. Department of Labor again presses the untenable theory that the circuits agree that a treating doctor rule is appropriate for black lung claims and that the "unpublished" status and lack of finality of the Sixth Circuit's opinion here makes review inappropriate under any circumstances. It is hard to dispute the circuit disagreement following the Fourth Circuit's decision in *Consolidation Coal Co. v. Held*, 314 F.3d 184 (4th Cir. 2002). In *Held*, the majority expressly refuses to accord weight for status to a treating doctor, while the dissent argues for application of the Sixth Circuit's approach in *Jericol Mining*. 314 F.2d at 187-188, 189. The fact that the Sixth Circuit's decision here is unpublished is of no significance inasmuch as the rule reflected in the Sixth Circuit's opinion requires that additional weight be accorded treating doctors on account of their status for no reason or an invalid one. *Gray* is no different in this respect than *Groves* or *Jericol*. In all these cases, the court demands unwarranted credit for a treating doctor's status. It makes no difference how the court articulates its clear intention to apply a treating doctor rule or whether the court designates the opinion for publication. Neither is the fact that the case was remanded a reason to deny review. There is no doubt what must happen when the case is returned to the agency, and the controlling legal question brought to the Court is finally resolved by the Sixth Circuit's opinion.

9. Finally there is considerable urgency in having the black lung treating doctor issue resolved expeditiously. Although acceptance of a treating doctor rule predicts substantial future disruptions for employee benefit plans, significant disruptions already have occurred for coal mine operators and their insurers as a result of the black lung treating doctor rule. Basic insurance rates for smaller mine operators have increased by at least 200% in significant part in anticipation of a widespread treating doctor rule. *See Groves*, Petition for Certiorari at 28 nn. 20-21. Unrefuted actuarial studies predict substantial increases in benefits and medical costs for employers and insurers as well. *Id.* The treating doctor preference touches on all medical eligibility criteria in black lung claims and is, therefore, the principal cost driver for these increases. *Id.*, nn. 19, 20.

10. Peabody should not be required to pay black lung benefits solely as a result of a rule that is invalid for ERISA cases, should that be the result in *Nord*. Nor should Peabody have its rights extinguished prematurely in this case.

It is, therefore, respectfully requested that this Court delay consideration of Peabody's petition for a writ of certiorari until a decision is issued in *Nord*.

Respectfully submitted,

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 533-2361